

MEMO ENDORSED

Michael A. Rosenberg

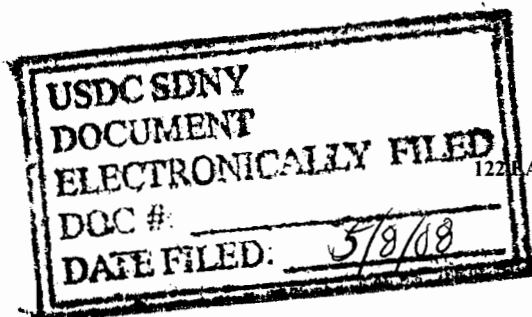
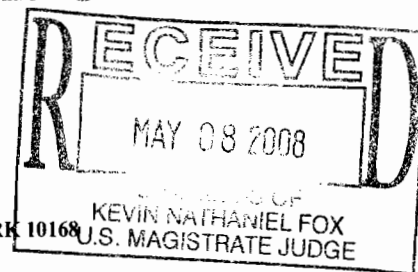
ATTORNEY AT LAW

THE CHANIN BUILDING

122 EAST 42ND STREET, SUITE 606, NEW YORK, NEW YORK 10168

TEL: 212-972-3325 / FAX: 212-972-3329

PLEASE REFER ALL CORRESPONDENCE
TO THE NEW YORK ADDRESS



SUFFOLK OFFICE
140 FELL COURT
HAUPPAUGE, NEW YORK 11788
TEL: 631-851-0088
FAX: 631-851-0820

JEFFREY W. WALLER
of Counsel

NASSAU OFFICE
1050 FRANKLIN AVENUE
GARDEN CITY, NEW YORK 11530
TEL: 516-294-5843
FAX: 516-248-8124

GEORGE F. HAND
of Counsel

QUEENS OFFICE
80-02 KEW GARDENS ROAD, STE. 1010
KEW GARDENS, NEW YORK 11415
TEL: 718-575-2225
FAX: 718-575-2228

JOAN A. SOARES
of Counsel

May 2, 2008

Hon. Kevin Nathaniel Fox
United States Magistrate Judge, SDNY
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: Mark Kapiti
v. Raymond W. Kelly, et. al.
07 Civ. 3782 (RMB) (KNF)

Honorable Sir:

I write this response out of utter disbelief that the defendant, City of New York, now makes the instant application. At no time during the Court Conference with Judge Berman on May 1, 2008 was this subject raised by the defendants and certainly it was never mentioned during the off-the-record and private conversation I had with Messrs. Frank and Hazan, counsel for the defendants. I should have anticipated that such a letter would be forthcoming, but usually their missives are transmitted after 5:00 on Friday evening.

The City's eight page diatribe, plus exhibits, not only flies in the face of Judge Berman's Rules, but is the quintessential example of a "tempest in a teapot" by someone with too much time on his hands and too little to do. During the Court Conference, Judge Berman admonished counsel to be mindful of the number of pages permissible when seeking Court intervention. As I recall the rules, letters to the Court are not to exceed three (3) pages and are to

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be double spaced.

While I disagreed with the Judge's directive in Court that I must simultaneously bear the burden of discovery, while at the same time being permitted permission to file a pre-answer motion to dismiss, this request by the defendants is beyond the pale. The City now requests that our client, American Honda Finance Corporation, be compelled to give both additional discovery pursuant to a witness subpoena, as well as traditional party discovery in the litigation, even though issue has not yet been joined. Such a position is patently absurd and contrary to acceptable practice.

Our client has previously responded to the witness subpoena. I am surprised that recently admitted counsel saw fit to remain silent in the Courtroom, but surely even he knows the difference between a witness and a party. Counsel's attempt to initiate a third-party proceeding, while inept, still sought to make our client a "party". The "witness" subpoena died with that attempt.

While the Court may have developed a particular dislike for this litigation, our client should not be punished for the animus that has heretofore existed between the plaintiff and defendants. Nor should our client be punished for the laches exhibited by the defendant in waiting almost one full year since the litigation commenced to first "wake up and smell the coffee" and seek to commence a third-party action.

American Honda Finance Corporation also has rights in this matter. If counsel wishes to engage in a war of attrition, then so be it. But that does not obviate our client's rights.

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I thank the Court for its consideration and its willingness to listen to what clearly is the other side of the story.

Respectfully submitted,

MICHAEL A. ROSENBERG

MAR:dj

cc: American Honda Finance Corporation

cc: Hon. Richard M. Berman
United State District Judge, SDNY
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

cc: Steven L. Kessler, Esq.
Attorney for Plaintiff
122 East 42nd Street, Suite 606
New York, New York 10168

cc: Philip S. Frank, Assistant Corporation Counsel
The City of New York, Law Department
100 Church Street
New York, New York 10007

5/8/08
While American Honda Finance Corporation is correct when it notes that the more prudent course of conduct might have been for the parties to confer, a valid subpoena appears to have been issued to it, and no application to quash or modify the subpoena was made timely, as required by Fed. R. Civ. P. 45(c). In addition, no protective order was sought pursuant to Fed. R. Civ. P. 26(c). Moreover, a cursory review of the privilege log prepared by American Honda Finance Corporation reveals that it lacks utility in that it fails to contain entries of sufficient detail and, in some instances, asserts a specious "privilege." Therefore, on or before May 13, 2008, American Honda Finance Corporation shall comply with the subpoena.

SO ORDERED:
Kevin Nathaniel Fox U.S.M.J.